No.80-514

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

LOCAL UNION NO. 137; LOCAL UNION NO. 150; LOCAL UNION NO. 278; LOCAL UNION NO. 296; LOCAL UNION NO. 315; LOCAL UNION NO. 386; LOCAL UNION NO. 431; LOCAL UNION NO. 439; LOCAL UNION NO. 490; LOCAL UNION NO. 533; LOCAL UNION NO. 588; LOCAL UNION NO. 624; LOCAL UNION NO. 980, all affiliated with the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioners,

v.

FRITO-LAY, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

DUANE C. ALDRICH
JOSEPH W. DORN
KILPATRICK & CODY
3100 Equitable Building
100 Peachtree Street
Atlanta, Georgia 30043
(404) 572-6500

Attorneys for Respondent

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

QUESTIONS PRESENTED[1]

The issue presented for review by Petitioners is more properly stated as follows:[2]

1. Whether the court of appeals correctly concluded that substantial evidence in the record supports the district court's factual finding that the object of the Union's strike was to force or require Frito-Lay to bargain and act as if it belonged to an employer organization.

In the event the Petition is granted to determine the foregoing question, Petitioners have requested the Court to review two additional questions, which are more properly stated as follows:

2. Whether the court of appeals correctly concluded that substantial evidence in the record supports the district court's factual finding that the Union did not abandon its illegal strike objective prior to commencement of the strike.

3. Whether the court of appeals correctly concluded that substantial evidence in the record supports the district court's finding that the Union's illegal strike objective was a substantial—if not the sole—cause of the strike, thus entitling Frito-Lay to recover damages attributable to the strike.

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[1]Respondent, Frito-Lay, Inc., is a wholly-owned subsidiary of PepsiCo, Inc.

[2]The Union concedes that the court of appeals and the district court correctly held that Section 8(b)(4)(A) proscribes forced multi-employer bargaining and not merely forced membership in a formal multi-employer organization. (Petition, at 12) In view of that concession, this Court should summarily reject the Union's attempt to transform a simple factual finding of two lower courts into a novel question of law that warrants *certiorari* review.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Frito-Lay, Inc., respectfully requests that this Court deny the Petition for Writ of Certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit.

STATEMENT OF THE CASE

Frito-Lay filed its Complaint in May of 1974, alleging that the defendant Union Locals (hereinafter, the "Union") were then engaged in a strike in Central and Northern California having an illegal object of forcing or requiring Frito-Lay to join an employer organization in violation of Section 8(b)(4)(A) of the Labor Management Relations Act, 29 U.S.C. §151, *et seq*, (hereinafter, the "Act"). Subject matter jurisdiction was based upon Section 303 of the Act, which provides that whoever shall be injured in his business by an unfair labor practice as defined in Section 8(b)(4) of the Act may bring suit in federal district court to recover damages and the cost of the suit.

In ruling upon defendants' Motion to Dismiss the Second Amended Complaint[3] (R. 167-169), the trial court issued a Memorandum of Opinion (R. 196-207) detailing its interpretation of Section 8(b)(4)(A) as applied to the allegations of this case. The court carefully reviewed the legislative history of Section 8(b)(4)(A) and concluded that Congress intended the proscription against "forcing or requiring any employer . . . to join any . . . employer organization" to prohibit involuntary multi-employer bargaining. Accordingly, the court held that Section 8(b)(4)(A) proscribes not only strikes where an object thereof is to force an employer to join a formal employer organization, but also strikes where an object thereof is to force several employers to act in effect

[3]In the Second Amended Complaint, Frito-Lay set forth in detail its factual allegations as of that date.

as if they belong to such an employer organization. (R. 205) Based on that interpretation of Section 8(b)(4)(A), the court ruled that Frito-Lay's allegations stated a claim for relief. (R. 207)

Contrary to the Union's suggestion in its Petition, the district court's Memorandum of Opinion denying the Union's Motion to Dismiss did not encompass a consideration of "substantially all of the material facts subsequently relied on by the court in making its decision." (Petition, at 9) During the trial of the issue of liability, Frito-Lay offered significant evidence not alluded to by the allegations of the Second Amended Complaint. In particular, Frito-Lay offered evidence (1) that the Union's intent was to force Frito-Lay and its two snack food competitors, Granny Goose Foods, Inc. ("Goose") and Laura Scudder's ("Scudder's"), to reconstitute the employer organization and to negotiate a multi-employer contract, (2) that the Union failed to recommend the May 3, 1974 "settlement" with Goose for ratification at the May 11 membership meeting because Frito-Lay and Scudder's refused to accept that settlement as a multi-employer contract covering their employees as well, and (3) that the Union arranged joint meetings to force the three companies to negotiate identical contract language.

After the trial of liability, the district court found, *inter alia*, that "the intent of the negotiating committee was in effect to force the three companies to reconstitute the employer organization and to negotiate a multi-employer contract." (Findings, ¶ 15, R. 384) The court further found that during the negotiations the Union (1) insisted upon and repeatedly demanded that the three companies agree to either a multi-employer contract or three separate but

identical contracts (Findings, ¶ 19, R. 384-85); (2) insisted upon and demanded that Frito-Lay agree to contract provisions that were inapplicable to Frito-Lay's business operations, but applicable to the business operations of Goose or Scudder's (Findings, ¶ 21, R. 385); (3) at various times conditionally accepted Frito-Lay's contract proposals contingent upon acceptance of the exact same proposals by Goose and Scudder's in order to force Frito-Lay to accept a multi-employer contract (Findings, ¶ 22, R. 385); (4) at various times arranged joint meetings to force the three companies to negotiate identical contract language (Findings, ¶ 23, R. 385); (5) failed to ratify the Goose settlement at the May 11 meeting of the membership because Frito-Lay and Scudder's refused to accept that agreement (Findings, ¶ 24, R. 385-86); and (6) used group voting on February 23, March 30, April 27, and May 11, 1974 to insure the ratification of a multi-employer contract and to force the three companies to reconstitute the employer organization. (Findings, ¶ 25, R. 386)

Based upon all the evidence in the record, the district court found that "the object of defendants' strike was to force or require Frito-Lay to bargain and act as if it belonged to an employer organization." (Findings, ¶ 29, R. 387) The court thus concluded that the Union had engaged in unfair labor practices within the meaning of Section 8(b)(4)(A) of the Act (Conclusions, ¶ 4, R. 387), and ordered that Frito-Lay should recover its damages in the amount proven at the damage phase of the trial. (Order, R. 388)

The trial court subsequently found that Frito-Lay sustained lost profits of $554,154 and extraordinary expenses of $134,364, both "as the direct result of defendants' illegal strike." (Findings, ¶ ¶ 1-2, R. 548-49) Judgment was ac-

cordingly entered in favor of Frito-Lay and against defendants in the sum of $688,518. (R. 550-551)

On appeal to the Court of Appeals for the Ninth Circuit, the Union argued that Section 8(b)(4)(A) proscribes a strike directed at forcing an employer to become a member of an existing employer organization, but that it does not proscribe Union action taken to force employers to bargain on a group basis. The Union also contended that the trial court's findings of fact nos. 21-22, 24-25, and 29 relating to the question of liability and the trial court's findings of fact nos. 1-2 relating to the award of damages were all clearly erroneous. The Union argued that its attempt to obtain common contracts from the three companies was motivated by legitimate bargaining concerns rather than a desire to force the three companies to form a multi-employer group and that, in any event, it had abandoned its demand for a common contract prior to the strike. The Union further contended that Frito-Lay was not entitled to damages because there was not substantial evidence that the Union's illegal objective alone would have caused the strike.

The court of appeals agreed with the district court's interpretation of Section 8(b)(4)(A). It affirmed the judgment of liability, but limited it to the period of the strike from May 12 to June 7, rather than from May 12 to June 29 as found by the trial court.[4] It remanded for further proceedings on the question of damages.

With respect to the proper interpretation of Section 8(b)(4)(A), the court of appeals stated that while no NLRB

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[4]By limiting Frito-Lay's damages to those sustained from May 12 to June 7, 1974, rather than those sustained during the entire strike period (May 12 - June 29, 1974), the court of appeals has substantially reduced, by over 40 percent, the amount of the trial court's judgment.

decision had reached the precise issue before it, the pertinent NLRB decisions did not emphasize formal membership in an existing organization as a necessary component of a Section 8(b)(4)(A) violation. *Frito-Lay, Inc. v. Local Union No. 137, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,* 623 F.2d 1354, 1358 (9th Cir. 1980). In fact, the court below noted, neither the Board nor the courts have ever required that employers organize themselves into a formal association to be considered an employer organization for purposes of the Act. Thus, the court of appeals reasoned that it would be "unlikely that Congress sought in Section 8(b)(4)(A) to prohibit a Union from forcing an employer to become a member of an employer organization but to permit a union to force competing employers to bargain together as an informal group." *Id.* The court of appeals found further support for the district court's interpretation of Section 8(b)(4)(A) in the legislative history of the Act, which indicates that Congress was concerned with forced multi-employer bargaining in general, not with forced membership in an existing organization. In view of that legislative history, the court of appeals agreed with the district court in concluding that Section 8(b)(4)(A) prohibits coercive union conduct with the object of forcing employers to engage in multi-employer bargaining, whether as a formal association or an informal group. *Id.*, at 1358-59.

Upon review of the record made at trial, the court of appeals concluded that there is substantial direct evidence to support the district court's finding of illegal motive and that the district court's finding of an illegal union objective to force multi-employer bargaining is not clearly erroneous. *Frito-Lay, Inc., supra,* 623 F.2d at 1360-1361. The court likewise concluded that substantial evidence supports the

district court's finding that the Union's illegal motive continued up to and was a substantial cause of the strike. The court below found clearly erroneous, however, the district court's finding that the illegal objective continued for the duration of the strike against Frito-Lay. The court of appeals found, rather, that the illegal purpose was abandoned on June 7, 1974, when the Union ratified a separate contract with Goose.[5] *Id.*, at 1362. Finally, the court of appeals sustained the district court's factual finding that the Union's illegal objective was at least a substantial — if not the sole — cause of the strike, thus entitling Frito-Lay to recover all damages attributable to the strike. *Id.*, at 1363.

SUMMARY OF ARGUMENT

Contrary to the suggestion of the Union's Petition, the decision of the court below definitely does not stand for the proposition that a strike to secure uniform wages and working conditions for employees of competing employers constitutes a violation of Section 8(b)(4)(A) of the Act. Rather, the court of appeals merely found that substantial evidence in the record, including the Union's demand for a multi-employer contract, supports the factual finding of the district court that the object of the Union's strike was to force or require Frito-Lay to bargain and act as if it belonged to an

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[5]Pursuant to Rule 19.5 of the Rules of the Supreme Court, Frito-Lay has this day filed a conditional cross-petition for writ of certiorari, seeking review of the court of appeals' ruling that the illegal purpose was abandoned on June 7, 1974. As shown in Frito-Lay's cross-petition, substantial evidence in the record supports the district court's finding that the illegal objective was not abandoned prior to the cessation of the strike against Frito-Lay.

employer organization. In particular, the court below affirmed the finding of the trial court, based largely on the testimony of Union negotiators, that the Union's intent was to force the three competing employers to bargain as a multi-employer group.

No special and important reasons warrant this Court making a second review of the district court's factual findings. Resolution of the question presented would only affect the parties before the Court and would have no impact on future collective bargaining. The decision below is not in conflict with any reported decision.

REASONS FOR DENYING THE PETITION

I.

PETITIONERS' STATEMENT OF BOTH THE QUESTION PRESENTED AND ALSO THE REASONS FOR GRANTING THE PETITION ARE BASED UPON AN ERRONEOUS FACTUAL PREMISE NOT SUPPORTED BY THE RECORD OF THIS CASE.

Petitioners' statement of the question presented is based upon the erroneous premise that the district court found, and the court of appeals affirmed, a violation of Section 8(b)(4)(A) of the Act merely upon the basis of the following evidence:

> that the striking unions [sought] uniformity of contract conditions for all of the struck employers following the dissolution of a multi-employer, multi-union bargaining unit in which the employers and unions previously bargained.

Likewise, in the section of the Petition entitled "Reasons for Granting the Petition," Petitioners assert that the decision below stands for the proposition that "a strike to secure common terms and conditions of employment for employees of competing employers may be made the basis for a finding that the striking union has violated Section 8(b)(4)(A) of the Act." (Petition, at 15)[6]

The Union's premise for the question presented and the Union's characterization of the holding of the court below are false, misleading, and relate to a factual record that is not before this Court. Even a cursory reading of the district court's findings of fact and of the decision of the court of appeals indicates that liability was imposed upon the Union in this case not for seeking common terms and conditions of employment for the employees of three competing employers, but rather for forcing Frito-Lay to bargain and act as if it belonged to an employer organization. Moreover, the district court, sustained by the court of appeals, did not reach its ultimate liability finding based merely upon inferences derived from the Union's alleged objective of seeking common terms and conditions of employment. Many additional facts, including the admitted intent of the Union to reconstitute the erstwhile employer organization, were relied upon by the district court in reaching its ultimate factual finding.

Having corrected the factual premise of the Union's

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[6]At page 14 of the Petition, the Union asserts that no provision of the Act has ever been invoked to challenge the lawfulness of union efforts to attain uniform contractual provisions with competing employers whose employees they separately represent. On the contrary, the Union argued to the district court that because union insistence that an employer sign a contract applicable to another employer may violate Section 8(b)(3) of the Act, such conduct cannot also violate Section 8(b)(4)(A). (R. 121)

position to conform to the record of this case, it is apparent that the Union's challenge of the district court's decision and of its affirmance by the court of appeals is not based upon a disagreement over applicable legal principles. The Union has conceded, "at least for the purposes of this case," that Section 8(b)(4)(A) proscribes forced multi-employer bargaining and not merely forced membership in a formal multi-employer organization. (Petition, at 12) Thus, the Union no longer challenges the district court's interpretation of the scope of the Section 8(b)(4)(A) proscription. Rather, it challenges the factual finding that the Union did have the illegal objective of forcing Frito-Lay to bargain and act as if it belonged to an employer organization.

Accordingly, a fair and accurate statement of the question presented by the Petition is whether the district court's factual finding that the Union's strike had the illegal objective of forcing Frito-Lay to bargain and act as if it belonged to an employer organization is supported by the evidence in the record, not just the one category of evidence conveniently and repeatedly referred to by the Union as if it were the only evidence in the record.

II.

THE FACTUAL FINDING THAT THE UNION'S STRIKE HAD THE ILLEGAL OBJECTIVF OF FORCING FRITO-LAY TO BARGAIN AND ACT AS IF IT BELONGED TO AN EMPLOYER ORGANIZATION IS SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD.

The district court's ultimate factual finding on liability was that the Union struck Frito-Lay with the illegal objective of forcing or requiring Frito-Lay to bargain and act as if it belonged to an employer organization. (Findings, ¶ 29, R. 387) The Union would have this Court believe that such finding was based merely on the evidence that the Union sought uniform contract provisions among competing employers.[7] That suggestion is false and misleading. Frito-Lay never argued, and neither the district court nor the court of appeals ever held, that mere insistence upon uniform contract provisions constitutes a violation of section 8(b)(4)(A). The decision of the court of appeals does not, as suggested by the Union, stand for such a proposition.

Upon reviewing the evidence in the record, the court of appeals concluded that there is substantial direct evidence to support the district court's finding of illegal motive. The Union's suggestion that such finding of illegal motive was merely inferred from the Union's insistence upon uniform contract provisions is refuted by the district court's findings, by the appellate court's decision, and by the evidence in the record.

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[7]Petitioners' statement of the question presented for review reflects this erroneous characterization of the district court's decision. (Petition, at i)

The district court found that the intent of the Union's negotiating committee was to force the three companies to reconstitute the employer organization and to negotiate a multi-employer contract. (Findings, ¶ 15, R. 384) The distict court further found that the Union used group voting to insure the ratification of a multi-employer contract and to force or require the three companies to reconstitute the employer organization. (Findings, ¶ 24, R. 386) As pointed out by the court of appeals, direct evidence in the record demonstrates that the Union's members were sorely disappointed by the breakup of the multi-employer organization, with which the Union had negotiated five successive multi-employer contracts, and that the Union tried to perpetuate past bargaining practices by negotiating either a multi-employer contrat or three separate, but identical contracts.

Not only did the Union seek the same results as in the past, a multi-employer contract, it also used tactics designed to force the three companies to bargain together as if an employer group to achieve that result. For example, the district court found that the Union's "negotiating committee arranged joint meetings to force the three companies to negotiate identical contract language." (Findings, ¶ 23, R. 385) As noted by the court of appeals, the Union negotiators on several occasions expressed the "[w]ish [that] all you companies would get off your butts and get together," to come up with uniform language. These are items of direct evidence that the Union forced Frito-Lay to bargain on a multi-employer basis.

The court of appeals also notes that sworn testimony by the Union's negotiators supports the district court's finding that part of the Union's strategy was to persuade the companies to reinstate the erstwhile employer organization and that they utilized tactics designed to accomplish that

goal. The court of appeals quoted from the testimony of Union negotiator Marashian as one example of such direct evidence. Contrary to the assertion of the Union's Petition, however, the quoted Marashian testimony is not the only testimony in the record supporting the district court's factual finding. For example, Mr. Salido, co-chairman of the negotiating committee, testified that even after the dissolution of the multi-employer group, the negotiating committee "felt we should still negotiate the same way." (Salido Depo. at 26) Another Union negotiator's notes of a bargaining session reflect his understanding that Scudder's felt it was being forced into a multi-employer bargaining group. (Plt. Ex. 110) Mr. Salido and Mr. Marashian testified that the tactic of group voting was designed to prevent the negotiation of separate, non-uniform contracts. (Salido Depo. at 25; Marashian Depo. at 48) Some members of the negotiating committee questioned the use of group voting after the breakup of the employer organization. (Marashian Depo. at 17) For, as Marashian and Webb testified, the Union had never used group voting except when bargaining with an employer organization. (Marashian Depo. at 15-16; Webb Depo. at 21, 15)

Finally, the court of appeals stated that the context and history of the negotiations added further support to the district court's finding that the Union intended to force multi-employer bargaining. It thus concluded that

> a past history of successful multi-employer bargaining, coupled with direct evidence of union intent to continue bargaining on a multi-employer basis and resort to coercive tactics designed to implement that intent, establish an overall pattern of conduct supporting the district court's finding of an illegal union objective to force multi-employer bargaining.

Frito-Lay, Inc., supra, 623 F.2d at 1361.

Expressly refuting the Union's contention to the contrary, the court of appeals concluded that the district court did not rely solely on the effect of the Union's conduct to establish the illegal motive. In fact, the court of appeals agreed with the Union's contention "that where certain tactics are susceptible of innocent as well as illegal interpretation a court should hesitate to infer an illegal object based upon nothing more than mere conduct and its effects." *Frito-Lay, Inc., supra,* 623 F.2d at 1361.

The Union repeatedly asserts in its petition that the court below has equated multi-employer bargaining with seeking uniform contract provisions. That is not the case. The district court and the court of appeals closely examined the process of bargaining, not simply the end result of bargaining. For example, the district court found that the Union arranged joint meetings to force the three companies to negotiate identical language (Findings, ¶ 23, R. 385) and used group voting to force the three companies to re-constitute the employer organization (Findings, ¶ 24, R. 386). While some of the bargaining sessions between Frito-Lay and the Union were physically separate, the process of bargaining remained multi-employer for so long as Frito-Lay was forced to bargain over issues relevant only to its competittors. The Union forced Frito-Lay not to adopt, but instead to negotiate, bargain for, and draft a multi-employer contract. The Union offered the three companies no practical prospect of negotiating contracts that would be ratified by the membership, unless they reconstituted the employer organization and bargained together for uniform contract provisions.

III.

THE ADDITIONAL FACTUAL FINDINGS CHALLENGED ONLY IN THE EVENT THE PETITION IS GRANTED ARE ALSO SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD.

If a writ of certiorari is granted to review the district court's ultimate finding of fact on liability, and if the court declines to reverse the decision below on that issue, Petitioners request that the Court review two additional issues. Because the Union does not contend that either of these additional issues would warrant granting of the writ, the Court should not consider them in ruling upon the Petition. Nevertheless, Frito-Lay will respond briefly to each issue raised.

First, substantial evidence in the record supports the district court's finding that the Union did not abandon its illegal objective prior to commencement of the strike. The Union contended at trial and on appeal that because on May 1 it offered the possibility of separate compensation systems, it no longer could be said to have required the companies to bargain together on a multi-employer basis. As stated by the court of appeals, however, on May 10, 1974, two days before the strike, the Union's chief negotiator advised Frito-Lay that a strike over common language appeared imminent because Frito-Lay had not revised its proposal to conform with the Goose proposal. Moreover, even after May 1, the Union continued to employ group voting and to demand that each employer accept provisions inapplicable to its employees. Thus, the court of appeals concluded that the Union's purported willingness to allow the possibility of

separate compensation systems was so grudging as to conclude it was not genuine.[8]

The Union contends in its petition that the reasons given by the court of appeals are completly unpersuasive, because the "genuineness of the Unions' change of position is demonstrated by subsequent bargaining. . . ." (Petition, at 29) To the contrary, at the first bargaining session with Frito-Lay after the commencement of the strike (May 29, 1974), the Union reiterated its demand for a single contract and stated that separate compensation systems for each company would not be tolerated. (Clegg's testimony at liability trial, Tr. 54-55) Even after a separate contract with Goose was ratified on June 6, the intent of the negotiating committee remained to have Frito-Lay and Scudder's sign contracts identical to the Goose contract. (Webb Depo. at 69)

Second, substantial evidence supports the district court's finding that the Union's illegal objective was a substantial — if not the sole — cause of the strike, thus entitling Frito-Lay to damages attributable to the strike.

The court of appeals applied the standard of *Mead v. Retail Clerks Local* 839, 523 F.2d 1371 (9th Cir. 1975), in reviewing the Union's contention on appeal that because the strike had lawful[9] as well as unlawful objectives, Frito-Lay

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[8]Frito-Lay argued to the district court that the Union's purported willingness to allow separate compensation systems was a sham. (R. 376)

[9]This is a curious argument in that there was no finding by the district court that the strike had any lawful objective. (R. 380-388) Nor did the Union ever propose such a finding. Thus, the premise of the Union's third question presented—"the conceded fact that the strike was waged to secure economic benefits and improved working conditions" (Petition, at i)—is false and misleading.

was not entitled to receive damages. The court of appeals correctly noted that *Mead,* based upon traditional tort law principles, does not require that the illegal object be the sole cause of the strike, only that it be a substantial cause of the strike. Thus, the district court properly assessed damages attributable to the strike on the ground that the illegal objective was at least a substantial — if not the sole — cause of the strike.

IV.

NO SPECIAL AND IMPORTANT REASONS WARRANT REVIEW ON WRIT OF CERTORARI.

Notwithstanding the Union's statement to the contrary, the decision below clearly does not stand for the proposition that a strike to secure uniform contract terms for employees of competing employers may be made the basis for establishing a violation of Section 8(b)(4)(A) of the Act. Nor does the decision below stand for the proposition that forcing competing employers to accept common terms and conditions of employment for their employees is the equivalent of forcing multi-employer bargaining. Because the court of appeals decision does not stand for these propositions attributed to it by the Union, it will not and cannot have a "devastating effect . . . on established collective bargaining practices. . . ." (Petition, at 14)

To the contrary, the court of appeals merely reviewed the evidence in the record supporting each factual finding challenged by the Union and concluded that each finding at issue here was supported by substantial evidence and was thus not clearly erroneous pursuant to Rule 52 of the Federal

Rules of Civil Procedure. The court of appeals reiterated and endorsed the principle that uniformity of labor standards is a legitimate goal of collective bargaining. Moreover, the court of appeals expressly recognized that the tactics utilized by the Union in this case — *e.g.*, group voting, conditional acceptance, insistence on inapplicable provisions — may be "acceptable collective bargaining techniques when the Union employs them to achieve a legitimate goal, such as uniformity in working conditions." *Frito-Lay, Inc., supra,* 613 F.2d at 1359. Thus, the decision does not preclude Unions from using these tactics to achieve the legitimate goal of uniform wages and working conditions.

The court of appeals only held that such tactics, although innocent in and of themselves, can in context become part of an illegal overall pattern of conduct. Likewise, in *Utility Workers Union of America (Ohio Power Co.)*, 203 NLRB 230, 83 LRRM 1099 (1973), *enforced,* 490 F.2d 1383 (6th Cir. 1974), the Board stated that uniformity of labor standards is a legitimate union goal and that joint voting among the employees in separate units is not, *per se,* a violation of Section 8(b)(3) of the Act.[10] But the Union's insistence upon identical contracts and group voting, when viewed in the context of the facts of that case, evidenced the Union's objective to force the three companies into one multi-employer bargaining unit, in violation of Section 8(b)(3). The Board reasoned that a "policy such as uniformity, innocent in and of itself, can in context become a vital part of an illegal overall pattern of conduct." 83 LRRM at 1103. *Accord. NLRB v. Insurance Agents' Union,* 361

[10]Section 8(b)(3) of the Act makes it an unfair labor practice for a labor organization to refuse to bargain collectively with an employer.

U.S. 477, 506 (1980) ("The plan may make the parts unlawful.")

In this case, the district court did not impose liability on the Union for having fought for uniform wages and working conditions, nor for having used group voting or for seeking common contracts. Rather, the district court found that the object of defendants' strike was to force Frito-Lay to act and bargain as if it belonged to an employer organization. In particular, the district court found, based in large part upon the testimony of Union negotiators, that the Union's intent was to force the three companies to bargain as a multi-employer group. As stated by the court of appeals, that illegal intent "taints the more ambiguous activities of group voting, demands for inapplicable and uniform conditions, and conditional acceptance of contract provisions." *Frito-Lay, Inc., supra,* 613 F.2d at 1361. Moreover, the district court "did not rely solely on the effect of the Union's conduct to establish the illegitimate motive." *Id.*, at 1361.

Thus, no special and important reasons warrant this Court's review of the question presented on writ of certiorari. The issue is whether substantial evidence in the record supports the district court's finding. The court of appeals has reviewed the evidence and sustained the district court's findings. For this Court to reject the findings of the district court, accepted by the court of appeals, it would be forced to disregard this Court's repeated pronouncements that it "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 536 U.S. 271, 275 (1949). *Accord, Berenyi v. District Director, Immigration and Naturalization Service,* 385 U.S. 630, 636 (1967).

A further review of the evidence and a decision by this

Court will only affect the parties before it. No principles of law require resolution. A decision to affirm or reverse would merely relate to the quantum of evidence in this case; it would have no effect on collective bargaining in the future.

Finally, the decision below is not in conflict with the decision of another federal court of appeals on the same matter. The district court's Memorandum of Opinion has been uniformly cited with approval. *Union de Tronquistas de Puerto Rico v. Arlook,* 586 F.2d 872, 876, n. 3 (1st Cir. 1978); *Mobile Mechanical Contractors Association v. Carlough,* 456 F.Supp. 310, 315, 333-334 (S.D.Ala. 1978); *Benda v. Grand Lodge of International Association of Machinists & Aerospace Workers,* 442 F.Supp. 431, 436 (N.D. Cal. 1977). The case is thus inappropriate for review on certiorari.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

DUANE C. ALDRICH
JOSEPH W. DORN
KILPATRICK & CODY
3100 Equitable Building
100 Peachtree Street
Atlanta, Georgia 30043
(404) 572-6500

Attorneys for Respondent